

## *Skybridge Spectrum Foundation*

("Skybridge" or "Requester")

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To FCC Office of General Counsel

Via: David Senzel at: [David.Senzel@fcc.gov](mailto:David.Senzel@fcc.gov)<sup>1</sup>

Via: Austin Schlich [Austin.Schlick@fcc.gov](mailto:Austin.Schlick@fcc.gov)

Re: Report of impermissible ex parte communications: labeled in subsection below, but other text herein provides context.

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To FCC FOIA Officer

Via: [FOIA@FCC.GOV](mailto:FOIA@FCC.GOV)

Re: New FOIA request.

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March 27, 2011

### [Re filing in dockets 06-49 and 11-49](#)

Under the principal of disclosure and candor in the shared M-LMS radio service (as Skybridge described in its last filing in docket 06-49- Comments Opposing the Progeny rule waivers request), a copy of this is being filed in FCC dockets 06-49 and 11-49.

A copy of this will also be emailed to Bruce Olcott, counsel for Progeny, as shown in the email sending this request.

### [FOIA Request, Description of Records Requested](#)

Copies of all documents that relate to the matters in dockets 06-49 and 11-49 (each of which involve M-LMS licenses) that are not publicly accessible on ECFS in those two dockets. Said documents *include but are not limited to* any documents that were presented by, or relate to, Paul Kolodzy or Kevin Lo identified in the ex parte report they filed in docket 06-49 dated August 30, 2010 (copy attached hereto).

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<sup>1</sup> Mr. Senzel is listed here: <http://www.fcc.gov/ogc/xprte.html>. However, he has not responded to the undersigned's past communications. Thus, we also include Mr. Austin Schlick.

Said documents *also include but are not limited to* all FCC staff notes of any kind, including those taken to set up any meetings with FCC staff or at any such meetings, including the meeting described in the attached ex parte report, including the report's stated meeting topic

...to discuss the status of the LMS bands and the relevant rules in determining whether a service meets the multi-lateration requirements. Specifically, the build-out requirements were discussed with references to 2006 NPRM and the 2007 and 2008 Orders on build-out extensions for various license holders....

#### Report of Impermissible Ex Parte Presentations:

This is included with this FOIA request since the two are related, and may be part of the record on appeal to courts for both purposes, given the FCC's long history of these matters.

Skybridge asserts that the meeting, described above, was an impermissible ex parte presentation (specifically, one arranged by or for Progeny LMS, LLC) since by its content it was a "presentation" under ex parte rules (the "Presentation"), and --

(1) The meeting Presentation report did not describe anything about the actual substantive content of the presentation. There is no meaning to an ex parte meeting report that reports only the general topics discussed, since other parties with interest have no clue as to what was actually asked, argued, etc. In addition, any such report that does not state the FCC's comments and questions is defective for the same reasons, and it is not possible for the FCC to not have provided any comments or questions at all: whatever they were has to be reported or the other parties will be kept in the dark. (There is no description or presumption in FCC ex parte rules, and the related parts of the Administrative Procedures Act, that they only possible violation of the openness required is by non-agency presenters.)

(2) The meeting Presentation did not identify the M-LMS licensees involved. This appears to be Progeny (see below), but in any case, a meeting about FCC licensees' status, obligations, etc. without identifying them is not in the public interest, since there would be no legal interest and standing involved, and it would waste FCC staff time.

(3) The meeting Presentation was soon after Mr. Lo met with the undersigned, for Skybridge, in California asking about the same general topics as in the presentation (but seeking from Mr. Havens many details), and indicating an interest to use the M-LMS of Skybridge and its donor, Telesaurus Holdings GB LLC, for a new radio service that was not under the current M-LMS rules and Intelligent Transportation System purposes. The undersigned, Mr. Havens, made clear to Mr. Lo the Skybridge-Telesaurus firm commitment to ITS and its need in the nation. Mr. Lo showed no interest. Mr. Havens explained to Mr. Lo the history of Progeny in M-LMS including how it obtained M-LMS licenses from the Progeny entity that won them in the auction, and why that was being challenged. Mr. Lo stated he did not know about Progeny. Soon thereafter, Mr. Lo and Mr. Kolodzy filed the attached report. Mr. Lo and Mr. Kolodzy were not meeting the FCC in relation to Skybridge and Telesaurus (since the undersigned did not authorize that or in any way ask for it, but make clear their firm position before the FCC already expressed), and the only other M-LMS licensee with substantial M-LMS spectrum that could support the radio service Mr. Lo discussed with Mr. Havens, is Progeny.

Any presentation to FCC staff, and any response by FCC staff, by or for Progeny, including asking about, or presenting view on, the topics in the attached, is a “presentation” under FCC ex parte rules, and is not merely a presentation in docket 06-49 (a permit but disclose proceeding). Even if it was only related to 06-49, it is impermissible based on items ‘(1)’ and ‘(2)’ above. However, in this case, there are two restricted licensing proceedings involved<sup>2</sup> which require any “presentation” relating to them—if written only—to be copied on Skybridge and Telesaurus, and – if an oral in-person presentation—to be not made at all, unless Skybridge and Telesaurus were afforded by advance notices a reasonable opportunity to participate in the meeting (which required a description of the real agenda at the meeting ahead of time, and conferring on a time and date, as in a court deposition proceeding). Messrs. Kolodzy and Lo, and the M-LMS licensee(s) they were meeting on behalf of—that appears to be Progeny as explained above—did not do either: did not provide a copy of any written materials used at the meeting, and did not afford an opportunity to participate in the oral in-person presentation meeting, to Skybridge and Telesaurus. Thus, the presentation (or presentations, if both orally and in writing) were impermissible violations of FCC ex parte rules.

Over the course of FCC docket 06-49, Progeny has directly or via agents had numerous ex parte presentation meetings with FCC staff, up to the Commissioners level, and never provided in the docket a report of the ex parte meetings: only bare-bones statements of the general topics that mean nothing at all. All participants in the dockets of course know the general topics including what Progeny states. No one meets with FCC staff simply to re-state a broad, general position or topic. The meetings are to present details, new materials, new interests, special urgings on timing, etc. Thus, Progeny has violated FCC ex parte rules. It continued that by filings its recent rule-waver request for reasons stated in the undersigned

This letter to the FCC Office of General Counsel and the FCC FOIA office is for the following broader purpose--in addition to the report stated above-- among other related purposes:

Skybridge believes the DC Circuit Court will agree with its position stated in items “(1)” and “(2)” above. One core program of Skybridge as a nonprofit corporation is to pursue legal remedies under and to defend the public interest matters of the Communications Act, and ex parte matters are critical to defend to allow open and honest proceedings. FCC staff do not always pursue the public interest under the Act and related FCC rules. Nonprofit organizations often act as advocates of the public interest that is the basis of US law. To this end, Skybridge has filed to date over a half dozen cases in US Circuit Courts, two cases before the US Supreme Court, and a FOIA case against the FCC in the DC Circuit Court, and several other cases in trial courts.

A case regarding FCC lack of clarity and fair, even enforcement of its ex parte rules appears required. As a prime example, this M-LMS radio service has been held up by Progeny (and FCC staff accommodating Progeny) since it filed for rulemaking in year 2003, resulting in RM-10403, which in 2006 resulted in the NPRM docket 06-49, neither with any

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<sup>2</sup> These are specifically identified in Skybridge’s “Comments in Opposition, Errata Copy filed in docket 11-49 (original filed on 3.25.11, and errata copy on 3.26.11 with ECFS date of 3.28.11) which references the Skybridge filing on early 3.25.11 “Request to Reissue... Request to Extend Deadlines for Comments and Reply Comments,” in said docket: One is a pending challenge to all Progeny M-LMS licenses, and the other is a pending challenge on reconsideration to the grant to Progeny of an license construction deadline extension.

sound technical or public interest basis. Progeny obtained its M-LMS licenses after the auction from another legal entity (also using the name Progeny), and in that, failed to disclose that Progeny did not even exist as a legal entity in during the auction, and that its owner failed to disclose his affiliates multi-billion dollars a year in gross revenues in obtaining a 35% payment credit. The FCC did not apply its rules to disqualify Progeny. (The FCC has this evidence, at least for the last several years, since Skybridge-Telesaurus presented it, but has taken no action, which of course signals to Progeny that it will evade the evidence and disqualifying rule violations.) Thereafter, the FCC has accommodated Progeny in RM-10403 and 06-49 with no sound technical or policy basis, and most recently, placed on Public Notice within two days, its waiver request which contradicts its rule-change request in its explicit statement of need and its proposed solution. This history has been full of impermissible ex parte oral presentations by Progeny and its agents, including at high levels in the FCC whose offices declined meetings requested by the undersigned. Accordingly, Skybridge believes these matters should be challenged in the public interest in the Communications Act in appropriate litigation, after sufficiently exhausting administrative appeals. Exhaustion of appeals is not required under case law where it can be demonstrated to the court that it would be futile, including where the FCC has had ample opportunity to remedy the problem and chose not to; nor is it required under some private rights of actions provisions of the Communications Act, where the FCC will not enforce its rules that require actions including required disclosures in licensing matters, and in ex parte meeting presentations. However, this letter is a further good faith attempt by Skybridge and its supporting LLCs to obtain FCC action on the matters complained of above and in other filings in RM-10403, 06-49, and 11-49: all Progeny-benefit dockets with no sound basis,<sup>3</sup>

#### [FOIA Request, Maximum Search and Copying Fees](#)

Skybridge will pay up to \$500 (five hundred dollars), and if getting the requested documents is going to exceed this maximum search fee, then Skybridge asks that it be informed of the amount by which it will be exceeded since Skybridge may want the FCC to proceed anyway for whatever additional cost there may be, or Skybridge may modify its request so as to obtain copies of documents up to the maximum amount specified here.

The below request for fee waiver or reduction *does not conflict with* the preceding payment commitment, nor is any basis to delay the fulfillment of this request. (If the waiver request is denied after fees are assessed or paid, Skybridge may submit an appeal and a payment refund.)

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<sup>3</sup> Nothing the FCC ever stated in these dockets makes any sense technically or in the public interest of Intelligent Transportation Systems, of GPS and other location services, or anything but to allow Progeny to convert an ITS radio service into another commercial service it can more easily profit from or sell off: that conclusion is extensively supported in these three docket by Skybridge and Telesaurus. Progeny has not, from the time it applied to obtain M-LMS licenses in its competing long form with the actual auction winner, to this day, stated any specific plan to use its M-LMS licenses. only vague statements, and assertions of telephoning a “who’s who” of equipment companies to seek M-LMS equipment they would not make while at the same time informing the FCC that any such equipment will fail, and most recently seeking waiver of rules for an undisclosed alleged new one-way location service. This began by outright license-acquisition and payment-credit fraud on the FCC (Unities States), which is criminal, and from there has been nothing but smoke and mirrors. The FCC accommodation of this has never been explained.

### FOIA Request, Form of Documents

Skybridge seeks copies in electronic form (PDF, Word, Excel, etc.) of all requested documents described above that the FCC (the “Agency”) holds in electronic form, to be delivered by email. To the extent some of the requested documents are only held in “hard copy” paper form, then Skybridge seeks copies in that form.

### FOIA Request, Breadth and Clarity of Request

If the Agency believes the above request is not clear, or that the request would result in a large quantity of documents beyond the limit of our search fee noted below, then please let us know that promptly, and in that case, please provide a categorization by subject breakdown of the type of documents you believe will be responsive and the approximate number of documents in each category, so we can decide if to narrow our request, including to save time and cost.

### FOIA Request, Partial Disclosure and Withholding

If the Agency believes any document or part of any document requested cannot be disclosed due to a disclosure exemption under law, then please promptly release all documents and parts of documents for which no exemption applies or may apply, and (thereafter or at the same time, but not delaying delivery of the disclosable documents) explain the sort of documents or parts not disclosed and the basis for the withholding.

### FOIA Request, Waiver or Reduction of Fees

For reasons made clear in the past, Skybridge will challenge in court a denial of the fee waiver request. Skybridge is aware that Gary Micheals of the FCC has “determined” that Skybridge is commercial requester since it is supported by donations from commercial LLCs that are managed by Warren Havens, who is the Skybride Requester. However, Skybridge has not provided and by law cannot provide any private benefit to its donors or any entity. Skybridge previously several times presented to the FCC documentation showing that the IRS and State of Delaware recognize Skybridge as a solely nonprofit educational (and scientific and charitable) corporation under IRC §501(c)(3) and the undersigned has, in many FCC filings and dockets, affirmed what is repeated in this paragraph above. Skybridge has, from its start, engaged in those actions including with regard to materials obtained under FOIA from the FCC in two ways (1) publishing for the public benefit documents related to FCC and Communications Act decisions and litigation of significance such as at: [www.scribd.com/warren\\_havens/shelf](http://www.scribd.com/warren_havens/shelf) (in the various folders, including but not limited to the one “FCC legal...”<sup>4</sup> and (2) using the

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<sup>4</sup> The home page is: [http://www.scribd.com/warren\\_havens](http://www.scribd.com/warren_havens). As this states, it is a Skybridge publishing service. Warren Havens is used by Scribd to identify the person responsible for the publications. This shows over 33,000 “reads” as of the date of this letter. These are all detailed legal and technical documents that are not found on Google or other search engines and not read, except by persons specifically seeking this specialized material. This by itself shows that the FCC “determination” is incorrect and prejudiced. It was also made at a point in time and then applied without discretion to all Skybridge FOIA subsequent requests which violates FOIA legal principals, that each request and related fee waiver must be reviewed to determine if any fee

documents in own, nonprofit educational, scientific and charitable programs (other than said publication): both '1' and '2' entitle Skybridge to FOIA fee waiver or reduction. Skybridge has briefed the legal argument reasons, citing FOIA statute provisions and case law in past petitions for reconsideration on FOIA fee waiver or reduction denials, to the FCC Office of General Counsel ("OGC") and in the above noted court case,<sup>5</sup> the complaint of which the FCC OGC has. These legal arguments are referenced and incorporated herein.

Thus, the FCC (Mr. Michaels) determination has no factual or legal basis. Mr. Micheals has rendered many decisions that are prejudicial and incorrect as the basic facts and law. Based on these and other violations of FOIA law, Skybridge sued the FCC in US District Court, and the case is pending. It will be amended to add a denial of this fee waiver or reduction request, if the FCC denies this.

The undersigned certified under penalty of perjury that the following is true and correct: Skybridge is a nonprofit, tax-exempt scientific, educational and charitable foundation which, as one of its primary functions, researches and publishes information on FCC matters (and other matters) in the public interest.\* Skybridge intends to publish information resulting from the fulfillment of this FOIA request, including on its Scribd publishing service at the link provided below. In addition, and apart from said publication activity, Skybridge is, according to its Delaware certificate of incorporation and its IRS tax-exemption determination letter (see these documents submitted with the Skybridge Form 175 in this Auction 87), and according to its actual activities, a nonprofit tax-exempt corporation and a private operating foundation and will use the requested documents for its various other programs (those in addition to the above-noted publication program). Such other purposes including the defense and improvement of its own FCC M-LMS licenses for its nonprofit public-interest wireless programs. Skybridge is thus entitled to fee waiver or at least fee reduction for FOIA requests.

\* See e.g.

[http://www.scribd.com/warren\\_havens](http://www.scribd.com/warren_havens) and [www.tetra-us.us](http://www.tetra-us.us).

These are both undertaken by and for Skybridge Spectrum Foundation as the principal entity involved in the described public interest educational (and scientific and charitable) activities.

In addition, Skybridge provides further discussion and applicable facts and law in support of its fee waiver request in the Appendix hereto.

*Thus, under FOIA law, fees should be waived or reduced.*

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waiver should be granted. For example, a newspaper could seek documents only for commercial advertisement and now news or editorials, and that is not entitled to a fee waiver, but in another case, it may seek documents solely for news and/or editorial publication and that is entitled to a fee waiver. The FCC history of refusing, in all cases, Skybridges assertions of entitlement to fee waiver or reduction based on an old determination in one case, is *per se* unlawful and will be part of the above-noted litigation. FOIA litigation, if successful, results in attorney fee awards.

<sup>5</sup> *Skybridge v. FCC*, case number 1:10-cv-01496-CKK in the US District Court, District of Columbia.

However, if the FCC decides to use this fee waiver or reduction request to delay in any way the response to this FOIA request, then, under protest (and with intent to add this denial to the above noted US District Court case), Skybridge will pay the amount due (if otherwise lawful under FOIA, that is, lawful if Skybridge was a commercial requester) and seek a decision reversal and refund. I

In addition, Skybridge has never been late on any valid FCC FOIA (or other) payment obligation (nor has any Skybridge affiliate, but there is no FCC FOIA rule allowing attribution of non-requester late payments by any “affiliate” to a requester). Thus, the FCC cannot lawfully require advance payment from Skybridge in relation to this FOIA request. However, again, if the FCC requires that, Skybridge will pay that (if reasonable) under protest and undertake an appropriate appeal.

Respectfully,

A handwritten signature in blue ink, appearing to read "Warren Havens", written in a cursive style.

Warren Havens  
for  
Skybridge Spectrum Foundation,  
(Respd by email to three above-listed persons.)

Attachments



## Appendix

Further discussion of FOIA fee waiver or reduction request.

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Skybridge, as a *bona fide* 501(c)(3) non-profit organization, has the right to FOIA fee waiver or reduction, including as provided under 5 U.S.C. §552(a)(4)(A)(ii)(II):

[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.

Unlike §552(a)(4)(A)(iii), §552(a)(4)(A)(ii)(II) does not contain a “public interest” requirement, rendering moot the issue of whether the documents subsumed within the FOIA Requests will benefit the “public interest.” *See Eagle v. U.S. Dept. of Commerce*, 2003 U.S. Dist LEXIS 25444 \*6-10 (N.D. Ca. April 28, 2003) (noting the distinction between §552(a)(4)(A)(iii) and §552(a)(4)(A)(ii)(II)); *Electronic Privacy Information Center v. Dept. of Defense*, 241 F. Supp. 2d 5, 6 (D.D.C. 2003) (same).

Under §552(a)(4)(A)(ii)(II), the criteria are: (i) whether the FOIA request has been made by an “educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media;” (ii) whether the records are not sought for a commercial use. Skybridge satisfies these criteria.

Skybridge hereby represents and certifies, under penalty of perjury (by the signor below, who is the President of Skybridge), that it is seeking a fee waiver on the grounds that: (i) it is a non-profit, tax-exempt (under 26 U.S.C. §501(c)(3)),<sup>6</sup> scientific, educational and charitable foundation that researches and publishes information on communications-related matters in the public interest (in the fields of intelligent transportation systems, smart energy systems, environmental monitoring and protection, and other government-promoted public interest areas); (ii) it has been explicitly recognized by the U.S. Internal Revenue Service as a *bona fide* tax-exempt organization under §501(c)(3) by virtue of an IRS Exemption Letter (a copy of the IRS determination letter is attached hereto); (iii) it is registered to do business in the State of Delaware as a non-profit corporation; (iv) it maintains a web-page at [www.scribd.com/warren\\_havens](http://www.scribd.com/warren_havens) on which it publishes a wide variety of information relating to FCC issues;<sup>7</sup> and (v) this web-page has received over 23,000 “reads” since November 2010.

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<sup>6</sup> Under IRS rules, “The exempt purposes set forth in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals . . .” *See* <http://www.irs.gov/charities/charitable/article/0,,id=175418,00.html>.

<sup>7</sup> The scope of the intended dissemination by Skybridge easily exceeds that which is required under §552(a)(4)(A)(ii)(II). “Requestors’ statements of intent to disseminate requested information through newsletters, popular news outlets, and presentations to public interest groups, government agencies, and the general public are sufficient to entitle an organization to a



This website evidences its educational purposes. In short, Skybridge has no commercial activities whatsoever.

In response to prior FOIA requests by Skybridge, other federal agencies (including the Department of Energy and others) have granted fee waivers to Skybridge, correctly recognizing that it is a *bona fide* educational and charitable foundation. Therefore, Skybridge meets the first prong of §552(a)(4)(A)(ii)(II)'s two-part test.

Regarding the issue of whether the records requested are being sought for a “commercial use”, as shown above, Skybridge has no commercial purpose for the records requested by this FOIA request. There is a paucity of case law specifically discussing the meaning of this phrase, “commercial use”, (as used in §552(a)(4)(A)(ii)(II)). The responding agency, in addressing this issue, should be mindful of the fact that Congress intended for the FOIA fee waiver standard be liberally construed. *See Eudey v. CIA*, 478 F. Supp. 1175 (D.D.C. 1979); *Ettlinger v. FBI*, 596 F. Supp. 867 (D. Mass. 1984); *W. Watersheds Project*, 318 F. Supp. 2d. at 1039 (“The fee waiver provision of the Freedom of Information Act (FOIA) is to be liberally construed in favor of waivers for noncommercial requesters. It should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver.”) Similarly, once a FOIA requester makes a *prima facie* showing that it is entitled to a fee waiver, the burden shifts to the agency to show why a waiver would be *improper*. *Ettlinger, supra*; *see also, Friends of the Coast Fork v. US DOI*, 110 F.3d 53 (9<sup>th</sup> Cir. 1997). Therefore, Skybridge meets this second prong of the above-noted two part test as well.

For the above reasons, the requested fee waiver should be granted. However, as noted above, under the section “Maximum Search Fee”, consideration and decision on this fee waiver request should not be used to delay fulfilling the FOIA request, including since Skybridge agrees to pay the noted amount, and potentially any additional amount if the agency shows why an additional amount may be needed. If Skybridge pays such an amount prior to a decision on the fee waiver request, then any grant of the fee waiver request would result in a refund.

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fee waiver.” *W. Watersheds Project v. Brown*, 318 F. Supp. 2d. 1036, 1041 (D. Id. 2004). Moreover, “information need not actually reach a broad cross-section of the public in order to benefit the public at large . . . . The relevant inquiry . . . is whether the requestor will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.*, *citing Carney v. US Dep’t of Justice*, 19 F.3d 807, 814-15 (2d. Cir. 1994).

August 30, 2010

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Notice of Ex Parte Communication, WT Docket No. 06-49

Dear Ms. Dortch:

On August 27, 2010, the undersigned along with Kevin Lo (via teleconference) held a meeting with Thomas Derenge (WTB), Paul D'Ari (WTB), Brenda Boykin (WTB), Bill Stafford (WTB), Paul Moon (WTB), and Ziad Sleem (WTB) to discuss the status of the LMS bands and the relevant rules in determining whether a service meets the multi-lateration requirements. Specifically, the build-out requirements were discussed with references to 2006 NPRM and the 2007 and 2008 Orders on build-out extensions for various license holders.

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS in the above-captioned proceedings.

Sincerely,

/s/ Paul J Kolodzy  
Paul J Kolodzy  
Kolodzy Consulting, LLC

cc (via e-mail): Thomas Derenge, Paul D'Ari, Brenda Boykin, Bill Stafford, Paul Moon, Ziad Sleem